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Brf. of A. G. (Thompson) in No. 278

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

EUTIMIO MONTOYA, SURVIVING PARTNER of the firm of E. Montoya & Sons,
v.
THE UNITED STATES AND MESCALERO Apache Indians.
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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

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STATEMENT OF THE CASE.

Montoya brought suit in the Court of Claims under the provisions of the Indian depredation act of March 3, 1891, alleging that certain Indians belonging to the Mescalero Apache tribe had, on or about the 12th day of March, 1880, taken from him property amounting in value to $5,750.

The act of March 3, 1891, provides for recovery for—

> All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States.

The Court of Claims held that the property of the claimant was taken by Indians who belonged to Victoria's band of Apaches; that that band was not at the time of the depredation, and had not been for two years prior to that time, in amity with the United States; and thereupon dismissed the petition. The claimant appeals from that judgment.

The contention of the appellant is that the court erred in finding that the band to which the Indians committing the depredation belonged was a band within the meaning of the act of March 3, 1891; that Victoria's band had not the capacity for hostility to the United States; that it was not an independent band; that the responsible entity against whom judgment should be rendered is the tribe or nation to which the band belonged, or to which the Indians who committed the depredation originally belonged; and that the band itself did not sustain a relation of hostility to the United States at the time of the alleged depredation.

The last contention, so far as it relates to the fact of hostility, as distinguished from the question of responsibility, is a question of fact which it would be appropriate to urge on motion for a new trial, but which is not raised by the record here. The ultimate finding of fact made by the Court of Claims, that Victoria's band was not in amity with the United States, supported as it is by the findings showing military activity on the part of the Indians and the United States, establishes the fact of hostility; and this court will not go back to those findings for the purpose of inquiring into the actual status of the Indians in that respect. The general question of the

meaning and application of the word "amity" in the act of March 3, 1891, in previous acts, is settled by the case of *Marks* v. *The United States et al.* (161 U. S., 297).

The other contentions made by the appellant are all resolvable into the one proposition that Victoria's band was not such a "band" as was contemplated by the act of March 3, 1891; and that is the sole question raised in this case.

WHAT IS A BAND OF INDIANS?

The statement of the case in the appellant's brief (p. 2) assumes that the decision of the Court of Claims rests solely upon the dictionary definition of the word band—"a company of persons united in any common design"—and does not hold that such band must be and in this case was a recognized political division among Indians. Even a cursory reading of the opinion of the Court of Claims will show that this assumption is incorrect. While the court did, of course, regard the ordinary meaning of the word as fixed by universal usage, it also considered the characteristics and customs of Indians, the recognition of their tribes as separate political entities, and concluded that Victoria's band was "long before that time known and recognized as a band separate and distinct in its organization and action." (Record, p. 5.)

The word "band" is not one which has a technical meaning. Subject to the requirements of the context, it is undoubtedly used in its ordinary signification, and must be so read. According to Webster a band is—

> A company of persons united in any common design, especially a body of armed men.

In the Century Dictionary a band is defined as—

> A company of persons, especially a body of armed men; a company of soldiers or persons united for any purpose.

The definition of the same word when used as a verb is, according to Webster—

> To unite in a troop, company, or confederacy; to confederate for some common purpose; to unite; to conspire together.

And according to the Century dictionary—

> To unite in a troop, company, or confederacy; to unite; associate; confederate for some common purpose.

It is indisputable that Victoria's band of Indians was a "band" in the ordinary sense of the term as fixed by common and universal usage. These Indians—not the particular ones who may have committed a depredation, but the recognized political body to which they belonged—were "a company of persons united in a common design;" they were "a body of armed men;" they were "united in a troop, company, or confederacy;" they had "confederated for a common purpose" and "conspired together."

Were they, then, such a "band" as was intended by the act of March 3, 1891? It is admitted, of course, that there might be a band of Indians confederated together for a purpose which would be wholly lawful, and that a band of Indians might be confederated together even for an unlawful purpose—so long as it did not involve hostility to the United States—without bringing themselves within the meaning of the statute.

The band of this statute must be a band capable of being in hostility against the United States. It is by inference something inferior to a tribe, as a tribe is inferior to a nation of Indians. The words are "any band, tribe, or nation." It must be in a measure independent, or it could not sustain a relation of hostility. On the other hand, it need not possess all the attributes of sovereignty, for no Indian tribe or nation has these, yet it is not disputed that such tribes and nations may be hostile within the meaning of the statute. It need not possess the capacity of making peace and war in the strictest sense of international law; for, as this court has said in the case of *Marks* v. *the United States et al.*) 161 U. S., 297):

> Without questioning these declarations and decisions, as applied to the relations between independent nations, we think they avail but little in the solution of the question here presented. That question is, What limitation did Congress intend by the words "in amity with the United States?" The word "amity" is not a technical term. It is a word of common use, and such words when found in the statute must be given their ordinary meaning unless there be something in the context which compels a narrower or different scope.

And further:

> We * * * are of the opinion that all that Congress meant was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of citizens of the United States, such depredation

> might be investigated and the amount of the loss determined and adjudicated by the Court of Claims.
>
> And if, on the other hand, the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the petition [that the tribe was in amity] is not sustained.

Given independence (by which is meant independence of other Indian authority) and a purpose to resist the authority of the United States by force of arms, on the part of the Indian band; and on the part of the United States the long-continued prosecution of hostilities against this band by formidable bodies of troops, and the accordance to them of the rights and privileges of belligerents when captured or when negotiating for terms, and, resulting from the attitude of the opposing forces, many skirmishes and some pitched battles, in which many Indians and many soldiers lost their lives, ending with either the surrender of the forces of the Indians under the regular forms and customs of war (which was the outcome in the case of one hostile band much smaller and less formidable than Victoria's band) or the extermination of the hostiles or the dispersion of the remnant of the band into smaller bands of guerillas, have we not here all the elements that are necessary to make a state of Indian warfare?

DISTINCTION BETWEEN TRIBE AND NATION.

Three different grades or classes of organization among Indians seem to be recognized by the statute—the band, the tribe, and the nation. The meaning of these terms must be derived from usage. Fortunately, we have the

long-continued use of all of them in treaties, official documents, opinions of the courts, and historical writings.

A "nation" of Indians may comprise several tribes, and is sometimes a loose term employed to denote a group of allied tribes, or a group of tribes having racial affinity with one another, where such tribes are severally independent and where no national organization exists; as in the case of the Apache Nation, the Sioux Nation. There is not and never was any central authority or organization whatever among the various tribes or bands of Sioux; so far as history records there never was any attempt at such organization on the part of the Apaches, the various tribes and bands being absolutely independent and autonomous in all respects. On the other hand, the term "nation" is also used to designate those political organizations of Indians which are farthest advanced in civilization and have the idea of civil government most fully developed; among these are the Creek Nation, the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation; these, with the Seminoles, are also frequently described as "the five civilized tribes," the terms tribe and nation being used here, as elsewhere, interchangeably by authoritative writers on the subject of Indian history. (Vide Census, 1890, volume relating to Indians, p. 25.)

There can be no hard and fast line drawn between a "nation" of Indians and a "tribe." The two words, when not used synonomously, convey so nearly the same meaning, and are so often used interchangeably as applied to the same divisions of Indians, that it is difficult to

distinguish between them in any degree. Where a distinction is intended it may be said that the tribe is usually smaller in numbers, though not always; the Comanche tribe or the Navajo tribe could muster thousands of warriors, while some of the so-called nations are much smaller. As compared with some of the bodies of Indians which are usually accorded the title of "nation," the tribe possesses a lower degree of civilization; its organization is not so complete, or is of a more primitive order, and it is more likely to be nomadic in character and to have no permanent home or seat of government.

The number of tribes of Indians in the United States is, and has been, very great in proportion to the total Indian population. The Indian population has ranged, according to various estimates and censuses, from 248,000 (the present enumeration) to 471,000, an estimate made by Jedediah Morse in 1822. Competent modern opinion holds that, contrary to the view once commonly accepted, the aborigines have increased in numbers rather than diminished; and that the total number within the present limits of the United States has never been greater than it is to-day. The number of distinct tribes and bands which have been recognized by treaty is very great. Prior to the year 1871, when Congress abolished the practice of making treaties with Indian tribes, 666 treaties had been negotiated (*Marks et al.* v. *The United States*, 161 U. S., 297). Many of these were with the same bands or tribes; but, on the other hand, there were many with whom no treaties were ever made; witness the various tribes of Apaches, the Mission Indians and other tribes in California, the different pueblos of New

Mexico. Many of the tribes once treated with have become extinct or merged with the white population, some new tribes and bands have arisen, and many have become known which were not known to the earlier writers and authorities. The report of Jedediah Morse in 1822 enumerated 230 tribes, not including, of course, many now within the limits of the United States; the census of 1890 gives 280 tribes (Census Report 1890, volume relating to Indians, p. 35). This increase of numbers, when we consider the great number of extinct tribes (21 stocks or linguistic families having completely disappeared: Census Report, p. 35), argues the constant formation of new tribes; although the tendency in this direction must have been greatly checked by the pressure of white supremacy and the collection of Indians upon reservations, where in many instances tribal distinctions were ignored. These new tribes may originate from factions divided and separated from the parent stock, or from the gathering of Indians from different tribes under a great leader for a common purpose, as in the case of Sitting Bull in 1876, who would undoubtedly have formed a distinct and permanent tribe in Montana from the numbers who flocked to his standard had not the strong arm of the Government been exerted to break up his band and drive its chief into exile.

DISTINCTION BETWEEN TRIBE AND BAND.

If we pursue further the distinctions which we have assumed to exist between nation and tribe and tribe and band, we find that the band is an aggregation of Indians

in many cases differing in no respect from a tribe, as in the case of the Ogallala band or tribe of Sioux. In other cases it is smaller and less prominent, or less ancient in its origin than most tribes, although still differing in no respects from other tribes. We conceive that a band, within the intent of the statute, may be an Indian organization the members of which came originally from different tribes, as in Victoria's band; or it may form a part of a single tribe which has been separated from the rest of the tribe by mutual consent or by the act of a superior power, or which has, under the leadership of a chief, broken away from the parent tribe and refused longer to owe it allegiance, as Dull Knife's band in the case of Conners, No. 279, which is to be considered with this case. All these methods of forming tribes have been recognized, and it is probable that the beginning of Victoria's band and Dull Knife's band differ in no respect from that of all tribes which are not of patriarchal origin. An instance of the formation of a tribe after one of the methods named above is found in the case of Joseph's band of Nez Perce Indians, which refused to join with the main portion of the tribe in the treaty of 1863 with the United States and remained thereafter a separate band or tribe, recognized throughout as such by the United States and subsequently becoming hostile in the Nez Perce war of 1877, during which the original Nez Perce tribe was not only in amity with the United States but actually allied with the Government against their former friends. *Wolverton* v. *The United States et al.* (29 C. Cls. R., 107.)

In the case of *Herring* v. *The United States and Ute Indians* (32 C. Cls. R., 536) the court has said:

> A band, being the lowest and smallest subdivision, confederates more readily than any other form of corporate existence, so to speak, and may be composed of Indians of different tribes or nations, and becomes a *de facto* band by the extent of its membership, its continuity of existence, and its persistent cohesion, subject to the control and power of a leader having the recognized authority of a commander and chief.
>
> *The different divisions of Indians have not usually originated from the conventional mode which organizes white persons into political communities, but have originated as a condition in fact, and when so existing they are recognized by the laws and treaties as a separate entity and held responsible as such.*

SIZE OF VICTORIA'S BAND.

It may be argued that Victoria's band and Dull Knife's band were not sufficiently important in point of numbers and fighting ability to carry on a war against the United States; and that, therefore, they should not be recognized as independent hostile bands; but if even a cursory examination be made of the history of various Indian tribes and bands which have been recognized as capable of carrying on war and of making peace with the United States from the beginning of our Government down to the present time, it will be seen that this objection is without weight.

It will be admitted that every independent tribe of Indians, whether recognized by treaty or not, comes within the provisions of the act of March 3, 1891.

Ten distinct treaties, ranging in point of time from 1795 to 1867, have been made with the Wea tribe, which is now located in the State of Kansas; and the Supreme Court has recognized the validity of these treaties and the incapacity of the State of Kansas to exercise jurisdiction over individuals of the tribe (*The Kansas Indians*, 5 Wall., 737, 741). There were confederated with them at different times the Peorias, the Kaskaskias, and the Piankeshaws, treaties having been made with all these tribes. Yet in 1872 the total population of all the tribes named, including the Weas, was only 160; and at the time of their confederation under the treaty of 1854 they numbered only 259. (Report Secretary Interior, 1872, p. 426.)

With the Wyandotte Indians the United States negotiated nineteen treaties, from 1785 to 1867. Seven of these, ranging in date from 1818 to 1855, were with the Wyandottes alone; in the others they were joined with other tribes. The Wyandottes numbered in 1872, 222 souls, and in 1862, 435 (ibid).

A treaty was made in 1853 with the Cow Creek band of Umpqua Indians in Oregon. The exact number of this band is not known, but it was very small.

The Quapaws, with whom treaties were made in 1818, 1824, 1833, and 1867, numbered in 1872 about 240 souls. (Report Secretary Interior, 1872, p. 425.)

With the Rogue River tribe of Indians the United States made a treaty in 1853 and again in 1854. This tribe was the judgment debtor and appellee in the case of *Valk* v. *The United States and Rogue River Indians*

(168 U. S., 703), in which this court affirmed the judgment of the Court of Claims, dismissing the petition on the ground that the Rogue River tribe was not in amity with the United States at the date of the depredation. This tribe consisted at the date of the treaty of 396 souls. (Report Secretary Interior, 1854, p. 502.)

The Otoes and Missourias, with whom numerous treaties were made from 1817 to 1854, numbered in 1872 only 464. (Report Secretary Interior, 1872, p. 417.)

The Bannock Indians and the Piute or Snake Indians who were associated with them numbered in 1872, 521 and 516, respectively (Report Secretary Interior, 1872, p. 439); and in the case of *Marks et al.* v. *United States et al.* (161 U. S., 297) this court has held that the tribes named were not in amity with the United States in 1878.

According to the census of 1890 "the Palaikaihan stock [linguistic family], Pitt River tribe, Round Valley Reservation, Cal., consists of a *number of small tribes of California Indians, numbering in all only 581.*"

Illustrations similar to those cited above might be multiplied indefinitely, but enough have been given to show that the policy of the Government from the beginning has been to ignore the relative size or numerical strength of the tribes or bands of Indians which appear to be, and in fact were, independent bands.

Even before the establishment of the present form of government in the United States it was the practice, as is well known, to make treaties with the Indian tribes regardless of their size. In *Cherokee Nation* v. *Georgia*

(5 Peters, 125) Chief Justice Marshall refers to the Catawbas, with whom, he says, we have many ancient treaties, but who consist of only 80 or 100 polls.

The findings of fact in Montoya's case show that at about the time of the depredation or a little later Victoria's band contained from 200 to 250 Indians from the Mescalero tribe alone. He had also, as the findings further show, an indefinite number from the Warm Springs Agency, and at one time had with him 400 Chiricahua Indians. The court says further:

> During all the period of hostilities, as aforesaid, Victoria had under him a minority of the Chiricahua tribe of Apache Indians. At his solicitation he was reenforced from time to time during said period by a minority of the Indians from the Mescalero and Southern Apache tribe; besides had under him a number of unknown Indians from Mexico, making in all about 200 Indians in his band at the time of the depredation hereinafter found. (Rec., 4.)

The statement in the appellant's brief that the number of Victoria's band varied from 13 to 250 is evidently based on the statement in the record that in June, 1879, Victoria, with 13 men, came into the Mescalero Reservation, which he left in July, taking with him not only the 13 men whom he had brought but all the southern Apaches on the reservation. This visit of Victoria to the Mescaleros bears every indication of having been for the purpose of stirring them up to hostility, and there is absolutely no foundation for the supposition that the 13 warriors who accompanied him composed his entire band, or were any more than a

bodyguard, to insure his safety from the reservation authorities.

In Conner's case the findings show that 320 Indians broke away from the reservation, to which they had been removed by authority of the Government, on September 9, 1878; the band under Dull Knife, at the time of the surrender, consisting of 148 souls, 49 of whom were men.

The war with Dull Knife's band is included in a list of about 40 important Indian wars of the century in the report of Indians taxed and untaxed of the Eleventh Census (p. 637).

These figures show that either of the bands whose status is under consideration was stronger numerically than many tribes and bands with which the Government has had treaty relations at various times extending over a long period of years; and stronger than some tribes, at least, which this court has decided to have been in relations of belligerency with the United States.

There can, therefore, be no argument against the recognition of these bands based upon their size.

THE SO-CALLED APACHE NATION.

That Victoria's band was similar in all essential respects to the other bands and tribes of Apache Indians is apparent to one who has carefully examined the history and relations of the Indians who were called by that name.

It can not be too strongly urged that a wholly false premise, leading to an utterly erroneous conclusion, would be relied upon if the court should accept any conception

of the Apache Indians as one tribe or nation, using the latter term in the political sense. The name is one indicating racial, rather than political, affinity; and the various tribes and bands of Apaches have always been independent in every respect of each other and often at war among themselves.

The Report of the Bureau of Ethnology for 1885–86, which is an exhaustive analysis of the racial relations of the American Indians, based on linguistic distinctions, uses the term "Apache" as descriptive of one branch of the southern group of tribes belonging to the Athapaskan family, the same group including also the Lipan Indians of Texas (now in the Indian Territory) and the Navajoes of New Mexico and Utah. The total number given as belonging to the southern group of the Athapaskan family is 23,409. Of this number the Navajoes alone numbered 17,208 and the Lipans 15, leaving *but 6,186 Apaches all told*. These were scattered over all New Mexico and Arizona, and one band (the Na-ish-a) in Texas. Aside from the Lipans and the Navajoes the principal tribes of this southern group were 14, as follows:

Arivaipa, Chiricahua, Coyotero, Faraone, Gileno, Jicarilla, Llanero, Mescalero, Mimbreno, Mogollon, Naisha, Pinal, Coyotero, Tchikun, and Tchishi. (Report Bureau of Ethnology, 1885—86, p. 55.)

It is to be noted that these are only the *principal* tribes, and that the report does not pretend to name all tribes and bands; and that this report was made in 1885, some years after the defeat and annihilation of Victoria's band by the United States army.

In the early stages of the litigation concerning Indian depredation claims this subject was involved in some confusion owing to the fact that treaties had been made purporting to be with the Apache Indians as a whole. A treaty was made with the "Apache Nation" of Indians in July, 1852 (10 Stat. L., 979), with the "chiefs and headmen of the Comanche, Kiowa, and Apache tribes or nations of Indians" in July, 1853 (10 Stat. L., 1013); one with the "Apache, Cheyenne, and Arapahoe tribes of Indians" in October, 1865 (14 Stat. L., 713); and one in October, 1867, with the "Kiowa, Comanche, and Apache tribes of Indians" (15 Stat. L., 589). The three latter treaties, however, were negotiated in Kansas, from 500 to 800 miles from the scene of operations of Victoria's band and more than a thousand miles from the home in Arizona of the majority of the Apaches; the only Apache Indians concerned in them were a small band known as the "Na-ish-a" band, which numbered about 500 at the time when the treaties were made, and 326 in 1885 (Report Bureau of Ethnology, 1885–86, p. 56; report on Indian tribes taxed and untaxed, Eleventh Census, p. 538). This small band was wholly separate from all other Apache Indians, and was so distinct in a political capacity that it was incorporated first with the Kiowas and Comanches by the treaty of 1853, then transferred to the Cheyennes and Arapahoes by the treaty of 1865, and finally returned to its association with the Kiowas and Comanches by the treaty of 1867. These facts appear in the reports accompanying the drafts of the treaties.

The fact that this small Na-ish-a band is described in a

treaty as "the Apache Nation" shows the loose use of the term and the imperfect knowledge of the situation which led to it. The same defect is apparent in the treaty of July, 1852, which purports to be with the Apache Nation alone; it is signed by only six chiefs or headmen, who could by no possibility have represented more than the same number of bands of Apaches; and when the situation became better known the absurdity of the treaty was so apparent that it has not been recognized as binding the various Apache tribes, the Commissioner of Indian Affairs having stated repeatedly that different tribes of Apaches were not in treaty relations with the United States; and in the Revision of Treaties with Indian Tribes, made in connection with the revision of the statutes in 1873, this treaty was omitted altogether.

The loose and inaccurate use of such expressions in treaties, and imperfect knowledge of the tribal relations of the Indians of the Far West and Southwest in the early days, have led to the impression that the Apaches constituted one political organization similar to that of the Navajoes or to the various bodies of the Five Civilized Nations. A more erroneous view could not be conceived. There is not and never was any sort of political connection between the different tribes and bands of Apaches. They have frequently been at war with one another. There is not and never was any central organization or any great chief recognized by all, or even by any two or three bands or tribes of Apaches. The very name "Apache" is used by those who are familiar with the relations of the Indians thus designated merely as a descriptive term applied to a group of tribes having

many characteristics in common, but who are wholly independent of one another as regards government and everything that pertains to tribal autonomy.

The Court of Claims, which has heard and determined more than 2,000 of these Indian depredation cases, during the process of which litigation the question of the amity and the political relations of the various tribes throughout the United States has been examined from every point of view and in the light of a vast quantity of documentary evidence, said in the case of *Dobbs* v. *The United States and Apache Indians* (33 C. Cls. R., 308, 314):

> As the litigation of these Indian depredation cases has gone on, the fact has become more and more apparent that the Southwestern tribes during the last fifty years have had no defined or definable nationality or tribal entity, and that they were little more than robber bands dwelling in the fastnesses of the mountains or moving like Arabs on the arid plains. The Apaches, for illustration, supposed to be one people, were a unity only in race. In fact, they consisted of bands having different habitats, with no common purpose, no semblance of government, tribal or confederate, occasionally cooperating in war against a common enemy, as civilized nations do, but being in their several entities each as distinct as if the others did not exist. They had no "long house," like the Iroquois, in which the representatives of the Six Nations met to confer concerning the common welfare, and no several organizations. These bands, too, were each of them paltry in numbers, so paltry that if they had appeared as rioters in one of our great cities the local police would have overcome them and restored

order without the aid of the military in a single day. Their strength was not in numbers or organization, but in their incomparable bravery, hardihood, and military genius—a genius which, until General Crook made friends with a portion of them and organized Apache scouts to follow and fight Apache Indians, had successfully resisted and eluded the military forces of the United States and Mexico. More than a hundred years ago the Apaches required the presence of 4,000 Spanish dragoons to protect the Mexican frontier.

The condition so clearly set forth in this opinion must be taken into consideration in interpreting the statute which refers to a "band" of Apache Indians.

DIFFICULTY OF DISCRIMINATING BETWEEN BAND AND TRIBE AND TRIBE AND NATION.

It must be apparent that the rough distinctions which were tentatively drawn between bands and tribes and between tribes and nations are by no means adhered to in the discussion and recognition of groups of Indians either by historians or by contemporaries. They have not been observed by the Government in its dealings with the Indians. Even in the making of treaties, where every solemnity is observed and where the greatest attention is paid to form, we find much confusion in this respect. Treaties have been made with bodies of Indians as "nations," and at a later date other treaties have been made with the same bodies of Indians as "tribes." Similarly, distinct tribes of Indians are sometimes called "bands" in treaties, the very act of making which show that the "bands," were

considered as wholly independent of other connection in a political sense, and that the Senate and the Executive used the word "band" to indicate a body possessed of the same qualified sovereignty and entitled to the same recognition in a political capacity as the "tribes" or "nations" with whom other treaties were made. Such treaties have been made with the "Eastern Band of the Bannocks and Shoshones," the "Blackfoot Band of Sioux," the "Bois-Forte Band of Chippewas," the "Calapooia" and "confederated bands of Willamette Valley," the "Pillager Band of Chippewas," various bands of Sioux Indians, and many others, the list being extended in the brief for the appellants (pp. 8–16).

The conditions which contribute to the confusion resultant upon the recognition of the various bodies of Indians as semiindependent states are well set forth by Bancroft in the passage quoted in the opinion of the court, which is printed as a part of the record in the Montoya case:

> But the great peculiarity of the Indians consisted in the want of political connection. A single band often constituted a government; a collection of 10 or 20 wigwams might be an independent state. The greatest chief in the country could not muster more than 700 or 800 fighting men. The dialect of each government seemed a language by itself.
>
> Their government rested on opinion and usage, and the motives to the usage were never embodied in language; they gained utterance only in the fact, and power only from opinion. No ancient legislator believed that human society could be maintained with so little artifice. Unconscious of political

> principles, they remained under the influence of instincts. Their form of government grew out of their contentions and their wants, and were therefore everywhere nearly the same. Without a code of laws, without a distinct recognition of success in the magistracy by inheritance or election, government was conducted harmoniously by the influence of native genius, virtue, and experience. * * * The Indian chief has no crown or scepter or guard. No outward symbols of supremacy or means of giving validity to his decrees. The bounds of his authority flowed with the current of opinion in the tribe; he is not so much obeyed as followed with the alacrity of free volition and therefore the extent of his power depends on his personal character. There have been chiefs whose commanding genius could so overawe and sway the common mind as to gain for a season an almost absolute rule, while others had little authority, and if they used menaces were abandoned.

In the last analysis the distinctions between band and tribe and tribe and nation vanish; and the common-sense view of the statute is, not to make the restriction clearly intended by its terms a matter of hair-splitting inquiry as to the political capacity of the hostile band of Indians, but to consider that by the inclusion of the term band Congress meant not to enter into the subtle refinements of international law, but to remove all possibility of doubt and to make clear provision, by the use of words which are easily understood and not susceptible of ambiguous interpretation, for recovery for depredations committed by individuals belonging to organizations which were at peace with the United States, and by the same

clear terms to enact that whenever any organized and armed Indian opposition to the United States authority and forces is in the field, persisting for a period of years under the same organization and the same leaders in the policy of war against the United States, the incidental depredations and foraging raids made by such organization or by its members are not depredations for which the United States is responsible to its citizens; in conformity to the universal rule governing responsibility for private property destroyed by the enemy in time of war.

THE ACT OF MARCH 3, 1891, DRAWN WITH REFFERENCE TO WARS WITH BANDS OF INDIANS.

That this was the purpose of Congress is made more certain by the fact that the act was apparently drawn with especial reference to the numerous wars which had been waged from time to time with bands of Indians similar to that of Victoria.

In the appellant's brief reference is made to the act of 1834, in which the same requirement of amity appears, but in which the only word used to describe the Indian body is the word "tribe." It is argued that the words "tribe, band, or nation" in the act of March 3, 1891, meant no more than the word "tribe" in the act of 1834. This, as an abstract proposition, may be granted; for it can not be doubted that if the court were charged with the duty of ascertaining whether a tribe to which depredators belonged was in amity with the United States, it would look to the actual independent political body, under whatever name, and its status with reference to amity would determine the jurisdiction of the court.

But, if there were any doubt upon this point, the deliberate action of Congress in 1891 would resolve that doubt in favor of the decision made by the Court of Claims. Between the date of the first and the last acts the policy of the Government with reference to Indian tribes had been radically changed. In 1871 Congress had prohibited the making of further treaties. It had become known to the executive branch of the Government and to Congress that the Indians of the Southwest did not possess a national government; that they were divided up into numerous small but independent bands, which severally had all the attributes of sovereignty ever possessed by any Indian tribe, but with whom it was no longer considered necessary to deal by treaty.

Again, Congress was informed that during the years intervening between 1834 and 1891, and more especially during the decade just preceding the latter date, there had been numerous Indian wars with bands of Indians which had never been treated with formally and whose recognition as independent powers had been practically forced upon the field of battle. The Blackhawk war from 1865 to 1867, the war with Dull Knife's band of Northern Cheyennes in 1878, with Sitting Bull's band of Sioux in 1876 and 1877—made memorable by the loss of the gallant Custer and his men—the war with Victoria's band in 1877–1880, and, still more recently, the noted campaign against the Apache chief Geronimo in 1885 and 1886, were all fresh in the recollection of everyone who had to deal with Indian affairs. It was in the light of knowledge of these facts that the act of March 3, 1891, was framed.

Turning now to the istory of the act itself we find that as it was passed by the House it required only that the depredation which was the subject of complaint should have been committed by Indians and that the court should find, if possible, the tribe of Indians by whom the wrong was committed and that the judgments should be charged against the annuities or permanent funds belonging to such tribe. (House bill No. 8150, Fifty-first Congress, second session; House report No. 1079, Fifty-first Congress, first session.)

In the Senate a substitute for this bill was adopted in which the requirement of amity was inserted, making the statute conform with all previous legislation on this subject; and the jurisdictional clause of the statute was framed as it now exists. By this provision, afterward enacted into law, the jurisdiction of the court was limited to cases where the political body to which the depredators belonged was in amity with the United States; but instead of using the single term "tribe" which had been used before, the more comprehensive description "band, tribe, or nation" was inserted. (Senate report 1886, Fifty-first Congress, second session.)

The appellees accept the conclusion that the word "band" has a similar meaning to the words "tribe" and "nation;" but to be similar is not to be identical. The association of terms which implies similarity precludes the possibility of identity. The presumption against redundancy in the statute is as strong as the presumption of similarity of meaning from the association of terms. The use of the word "band" indicates a knowledge on the part of Congress of the possible or actual existence of

an independent political organization among Indians which was not fully described by the word "tribe," though in all essential respects resembling a tribe. The only reasonable explanation of the insertion of the additional words is that Congress, with the history and character of the recent Indian wars fresh in memory, used the comprehensive terms of description, out of abundance of caution, to exclude any possible doubt as to the bodies of Indians whose amity was to be determined.

INDEPENDENCE THE TEST.

What, then, is the criterion by which we may determine whether an organization of Indians is capable of sustaining relations of belligerency? If, as we have seen, numerical strength is not the determining factor; if we find that bodies of Indians are recognized as States, who have no government except the will of a single chief, and others who have a government nearly as complex as our own; if in some instances this Indian State is fixed in locality while in others it is nomadic, having not even a village that is permanent; if all these organizations alike fail of having all the attributes of sovereignty, even the fundamental right of dominion over the soil being, to all alike, denied them by the United States; if none of these tests, nor any others that go to distinguish a civilized nation from a horde of savages, can be applied in the case of an Indian State, what is the standard by which the court can distinguish a responsible band or tribe of Indians from a mere body of irresponsible robbers and outlaws?

In the opinion of counsel for the appellees the test to be applied is that of independence. By this is meant not absolute independence, which no Indian State has, or ever had after the advent of the Caucasian race, but independence of other Indian authority. However a tribe or band may have originated, whatever the purpose of its members in confederating, however large or small the band may be, the moment its separation from another tribe or tribes assumed a character of permanency, the moment that it ceased to owe or to acknowledge allegiance to any other authority, the moment the tribe or nation of which it had formerly been a part, or to which its members had formerly belonged, ceased to exercise or to claim control over it, and expressly or tacitly disavowed responsibility for its acts, in that moment it became a de facto band (or tribe, if you will, since it is by the same means that tribes arise), and became a living entity, responsible for its own acts, and, under the statute, for the unlawful acts of its individual members.

The attitude of the Government from the beginning has been to recognize, under whatever name, the de facto organization which showed itself capable of acting for itself either in making war or in making a treaty of peace. To quote from the opinion of the Court of Claims in this case:

> The main purpose in treating with the Indians was to secure and maintain peace with them and thereby open up the country to advancing civilization; and whenever that could be obtained, treaties appear to have been made with them without reference to their particular form of government or

tribal organization. The chief executive or responsible head of the organization, whatever its character, was the one whose signature was sought in making treaties.

The cases cited in the brief for the appellant (pp. 33–35) hold that the courts must recognize bands, tribes, or nations as such when treaties have been made with them, the action of the political department of the Government binding the courts. It does not follow, however, that where no treaty has been made the court may not determine the status of the band or tribe from other factors. Indeed, counsel for the appellant would be the last to contend that recognition by a treaty is necessary to establish the suable character of an Indian tribe under the act of March 3, 1891, inasmuch as many similar claims are against Indian tribes with whom no treaty has ever been negotiated. The distinction is recognized in the opinion in the *Graham Case* (30 C. Cls. R., 333), quoted with approval by the appellant (brief, p. 35).

It is not to be lost sight of in considering this case that it arose in 1880, some years after the passage of the act of March 3, 1871, which forbade the making of further treaties with Indian tribes, while it recognized the validity of those which had already been made (16 Stat. L., 544 and 566). This does not affect the question of amity. The leading case on that question (*Marks* v. *The United States et al.*, 161 U. S., 297) involved a depredation committed in 1878. But since the date of the statute, of course, no band or tribe of Indians has been

recognized by treaty, and other factors must determine their status. Dull Knife's band had, prior to that time, followed the fortunes of the other bands of the Northern Cheyenne tribe. Victoria's band, while it was known as a separate band as early as the year 1868 (Report Secretary Interior 1868, p. 635), did not attain prominence until a later date. Hence neither of these bands could have been treated with formally.

In dealing with this question the Court of Claims, in the case of *Dobbs* v. *The United States and the Apache Indians* (33 C. Cls. R., 308), said, Chief Justice Nott delivering the opinion:

> In dealing with the question of the amity of such a tribe as a band of Apaches the court has been more and more compelled to fall back upon the purpose of the earlier statutes, which created a liability and gave to these claimants their right of action. That purpose, as has been said before, was to keep the peace—to prevent Indian warfare upon the frontiers. * * * The practical question then is, Who were the Indians whose amity was to be maintained? Who were the Indians so affiliated with the depredators in fact that the depredators might reasonably be regarded as a part of them, and they be regarded as a body whose amity it was desirable to maintain?

In another case in the Court of Claims, in a decision which has been acquiesced in without question by both claimants and defendants, and in a case where the amity of a small band of Apache Indians, who were at that time living along the banks of the Mimbres Creek in

New Mexico, and hence known as Mimbres Apaches, Peelle, J., delivering the opinion of the court, said:

> The policy of the United States in dealing with the Indians has been, as we understand, to accept the subdivisions of the Indians into such tribes or bands as the Indians themselves adopted and to treat with them accordingly.
>
> So that if such subdivisions, whether into tribes or bands, have not been recognized by treaty, but have been by the officers of the Government, whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe or band upon which to predicate a judgment.
>
> Or if there be no such recognition by the Government, then the court will accept the subdivisions into such tribes or bands as made by the Indians themselves, whether such tribes and bands be named by reason of their geographical location or otherwise.
>
> If a number of Indians, with a chief or headman, make their home in the vicinity of the Mimbres Rivulet, in New Mexico, or on the Arivaipa Creek, in Arizona, as a tribe or band, as in the case at bar, that is sufficient to identify them in the absence of any other name, and particularly when they are a part of a common family whose general or family name is known. (*Tully* v. *United States et al.*, 32 C. Cls. R., p. 1.)

THE CHARACTER OF VICTORIA'S BAND.

In the brief of the appellant there seems to be a curious assumption that the court will accept a view which is not sustained by the record, if it be but asserted often enough in the brief. From the expression on the outside of the cover, "Victoria's and other like marauding

bands," to the "disorganized and robber band without national character," on pages 32 and 33, the brief is filled with characterizations of Victoria's band as "robbers and murderers," "a gang of thieves," "a band of cutthroats," "a depredating band of renegades," et cetera.

It is needless to say that these expressions are not sustained by the record. The Court of Claims says expressly in its opinion:

> It was not an assembly or organization of people having in view plunder and pillage for a day or a week and then of separating and returning to their several homes * * * but it was a band separate and distinct in its organization * * * and having confederated themselves together under the leadership of Victoria as a band for the common purpose of hostilities and war. (Record, p. 11.)

And again—

> The confederation of Indians from the various tribes or bands under the leadership of Victoria, as set forth in the findings, *was not for the purpose of robbery and theft, but was for the purpose of aiding Victoria and his Chiricahua followers in resisting the military authorities in removing them to the San Carlos Reservation.* (Record, p. 7.)

If the history of Victoria's band originated in the attempt of the United States forcibly to remove the Chiricahua Indians from the home where they and their ancestors had been born, and from the land which long years of occupancy and enjoyment had caused them to regard as their own; if, as the necessary consequence of their rebellion against this summary action by the authorities of a race of people whom they, with at least

some show of reason, regarded as their oppressors, a war began in which they persisted, although fighting against overwhelming odds, even to the point of their annihilation—shall such a struggle be contemptuously characterized as that of a "band of cutthroats?" Shall the purpose which actuated this heroic band, battling for their homes, be scornfully dismissed as that of mere "robbers and murderers?" It must not be forgotten that this combat has been described to us only by the pens of the conquering race. If the Apache Indians had a Homer, who can doubt that the prowess and achievements of Victoria would be celebrated in poetry and song throughout a thousand years? We can not justify Victoria's method of warfare; but it was the Indian method, and we can not say because it was barbarous it was not war. It has ever been the custom of the victor to belittle and despise the purpose and motives of the vanquished, and the insolence of the conqueror often goes very far in the contemptuous characterization of his fallen foes; but in after years, when time has softened the injury inflicted by that foe and when man's passions have cooled, history can afford to do justice to the loser, even though he has had no advocate of his own race and his story must be told by the unsympathetic pen of his former enemy.

The statement that the existence of Victoria's band dates from the effort in 1876 to put the Chiricahua Apaches on the San Carlos Reservation is not strictly accurate. That was undoubtedly the date when it first engaged, alone and unsupported by other Apaches, in war with the United States; but Victoria's band was in existence, and was recognized by the United States as a

band, as early as 1868. (Report Secretary Interior, 1868, p. 635.)

Another wholly incorrect conception of the nature of the band would be derived from the acceptance of the following statement in the brief for the appellant: "They never had the necessary cohesion which would make them the proper subject of negotiations as a new tribe. They separated and gathered together as their convenience dictated. If some of his warriors left Victoria they returned to their reservation and resumed relations with the Mescalero, or Chiricahua, or other tribe to which they belonged." (Brief, p. 32.)

There is nothing whatever in the record to sustain or justify this statement. However different from ours the Indian's idea of tactics may be, however frequently they may have scattered for the purpose of eluding their foe, to gather again at some other point, there is nothing to show that any Indian warrior who once joined his fortunes with those of Victoria's band ever turned back.

Another erroneous view is that Victoria's band was made up of outlaws from other bands or tribes. It is of course true that he received accessions from other bands of Apaches—from the Mescaleros and from the so-called Southern Apaches—but this did not give character to the band. This had been in existence for years before that time, and Victoria had been its chief. These accessions came to him when in the full tide of success, after he had maintained the war with his own band for several years.

Subject to such considerations as necessarily arise from the act of 1871, forbidding the making of treaties with

Indian tribes in the future, and the fact that Victoria's band first came into prominent notice at a time subsequent to that date, the appellees contend that Victoria's band satisfies even the definition of the word "band" as given by the appellant on page 18 of his brief, to wit: "An organization of like character to a nation or tribe, capable of making treaties and holding tribal funds, entitled to the recognition of belligerent rights, and so recognized by the political department of the Government."

Victoria's band was an organization of like character to a nation or tribe of Indians in that it was a body of Indians recognizing a common chief, united in a common purpose, dwelling together and acting as a unit under the control and direction of the chief. It was as capable of making treaties and holding tribal funds as many another band of Indians with whom the United States has made such treaties, and there is nothing in the history of the dealings of the United States with Indian tribes to indicate that, had the opportunity arisen for making peace with Victoria's band, and had the making of treaties not been prohibited by statute before that time, a treaty of peace would not have been made with the band and the Indians composing it assigned to some one of the reservations set apart for Indians, or a separate reservation established for their occupancy, and annuities settled upon them to prevent a recurrence of their outbreaks against the white inhabitants of the country. This course was pursued again and again with Indians who had been at war with the United States and might have been pursued, even without the formality

of a treaty, in the case of Victoria, had his grievance against the United States been less acute or had he shown any disposition to forget the injuries that he had received and to adjust his differences with the authorities of the United States on a peaceful basis. To pass to the third division of the definition, Victoria's band was entitled to the recognition of belligerent rights, and actually enjoyed such belligerent rights, as did the Indians belonging to other bands who made war against the United States in the same fashion and under similar circumstances. Finally, Victoria's band was recognized by the political department of the Government, not, to be sure, by the negotiation of a treaty (for reasons already recited), but by that branch of the Government having supervision of Indian affairs, and by the action of the executive in prosecuting against him a long and vigorous war, in which he was accorded the rights of a belligerent and treated with as such when opportunity arose.

A QUESTION OF FACT.

From the arguments that have been adduced it must be apparent to the court that the question in this case is largely a question of fact. Was Victoria's band, as a matter of fact, an independent political entity, similar to other Indian tribes, possessing the power to make war as Indian tribes possess that power, entitled to belligerent rights; and had it been so recognized? The answer to these questions, as given by the Court of Claims, which in the trial and adjudication of more than 2,000 similar cases against hundreds of different tribes and bands has

become thoroughly familiar with the subject, is found in the findings of fact.

> From the reports referred to [reports of the Commissioner of Indian Affairs and the Secretary of the Interior, civil officers of the administration] in the foregoing findings, and also in the various reports of military officers and the Secretary of War, embodied in the report of the latter officer in 1878 and 1880, it appears that the Indians under Victoria, from whatever tribes, were recognized or referred to under the name of Victoria's band, and under that name were operated against for two years or more by the military authorities for their acts of war and hostility against the United States, until driven out of the country and destroyed, as aforesaid.
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> * * * * *
>
> Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the depredation set forth in finding 3 was committed by Indians belonging to a war party or hostile band known as Victoria's band of Apache Indians, which *was at and long before that time known and recognized as a band separate and distinct in its organization and action* from the several tribes then at peace to which its members had formerly belonged.

SHOULD THE MESCALEROS BE HELD RESPONSIBLE?

The suits brought under the act of March 3, 1891, are suits against Indian tribes. The Indian tribe is the primary judgment debtor in every case in which judgment is rendered for the claimant, except where the Indians can not be identified. By the sixth section of the statute it is provided that payment of the judgment shall be made, first, from annuities due the tribe; second, from

any other funds due the tribe from the United States arising from the sale of their lands or otherwise, and third, from any appropriation for the benefit of said tribe other than appropriations for their current and necessary support, subsistence, and education. In any case where no funds are available and where payment of the judgment must therefore be made from the Treasury of the United States, it is provided that the payment shall remain a charge against the tribe, to be deducted from any annuity, fund, or appropriation which may hereafter become available.

It follows that in the case of a depredation committed by one of these hostile bands, if we deny that the band is capable of maintaining hostility to the United States in the sense intended by the statute, payment for the depredations of its members must be made by the tribe or tribes to which they had originally belonged.

Taking this view of the case, the appellant argues that judgment should be rendered against the Mescalero Apache tribe. If the Indians committing the depredation belonged to the Mescalero Apache tribe, counsel says the tribe was in amity and therefore the judgment should be charged against that tribe. There is no reason, it is said, why the band's hostility should overcome the tribe's amity; why the temporary membership of Victoria's band should override the permanent membership of the Mescalero tribe. The answer to this is plain, assuming that the court shall agree with the opinion of the Court of Claims that Victoria's band was an independent band. The Mescalero Apache who left his reservation without the knowledge or contrary to the

wishes of the tribe and joined his fortunes with another independent band, having no relations with the Mescaleros, and at war with the United States, acted in a manner which was inconsistent with the longer retention of his membership in the Mescalero tribe and became ipso facto a member of the hostile band. For all purposes, he was no longer a Mescalero, but was a member of the band of which Victoria was chief. If in the expeditions which were from time to time made by Victoria's Indians for the double purpose of supplying the band with necessary provisions and supplies and of making effective their style of warfare, the particular raid which was the subject of this suit in the Court of Claims happened to have been committed by a member of the band who had formerly belonged to the Mescalero tribe, that circumstance was simply fortuitous. The character of the depredation is to be taken wholly from the nature and status of the organization to which the individual depredator belonged at the moment of the commission of the act. It is as if a detachment of Boer soldiers operating in Natal were ordered to make a foraging raid, and in so doing an American or German officer who had cast in his lot with the people of the South African Republic should be concerned in the taking of property. Suppose, for the purpose of illustration, that an international agreement existed by which civilized nations accepted a liability for the acts of their citizens similar to that which is imposed upon Indian tribes by the United States. In that event the circumstances would be identical with those in the case at bar. Would it be seriously argued that the

United States or Germany, being in amity with the British Empire, would therefore be liable to respond in damages for the acts of these adventurers who had joined their fortunes with one of the belligerent powers? Of course the question answers itself.

The statement is made that the allegiance of the depredators to Victoria's band was temporary, while their allegiance to the Mescalero tribe was permanent. There is no warrant in the findings for this assertion, unless we deny the possibility of any transfer of allegiance. On the other hand, the opinion says that this "was not an assembly having in view * * * separating and returning to their several homes." (Rec., 11.)

Even if the transfer of allegiance were not complete; even if the membership of the band were temporary, it would still be true that the members of the band, while they continued in such relation and operated with the hostile band and under its protection, owed to it a temporary allegiance which determined for the time being their national character.

The general principal is that an alien, while domiciled in a country, owes to it a local and temporary allegiance, which continues during the period of his residence, in return for the protection which he receives.

Janis v. *The United States*, 32 C. Cls., 407.
Hugh Carlisle et al. v. *The United States*, 16 Wallace, 147–156.
Leghorn Seizures, 27 C. Cls. R., 214.

The Mescaleros were bound to restrain their own members, but they were not obliged to go to war with Victoria's band to reclaim former members of their

tribe who had joined that band. This would be altogether in excess of the obligations of neutrals.

The question of the independence and tribal character of Victoria's band does not depend upon the accession of these Mescaleros. It was not until some time in the spring of 1880 that any of the Mescalero Apaches were induced to join Victoria; and then it was only the long-continued successful opposition of the band to the United States troops which fired the hearts of the Mescalero braves and induced them to cast in their lot with the hostiles. Victoria's band was, as we have already seen, known as early as 1868, and was composed primarily of Chiricahua Apaches. As such it was, at least after the forced removal of the Chiricahuas from their old home to the San Carlos Reservation and Victoria's refusal to submit, a homogeneous, independent hostile band. It had received accessions in 1879 from certain unattached Indians which had previously belonged to the Southern Apaches but were at that time kept by the Government on the Mescalero Reservation. These, however, were not Mescaleros. It was but a comparatively short time after the Mescaleros joined the band in 1880 that it was finally defeated in Old Mexico and Victoria with most of his followers slain.

The question of the tribal relations of those Mescaleros who had joined Victoria's band is, therefore, not involved with the question of the actual constitution and independence of the band, which were established before any of the Mescaleros joined it.

To hold any other tribe responsible for the acts of the Indians associated with Victoria would be highly unjust.

The statute imposes at best an extraordinary liability upon Indian tribes. It does this without the consent of the tribes, by the exercise of the strong arm of the United States. The only justification for the rule is that the protection which it affords to the settler whose property is taken by roving bands of Indians may induce him to refrain from indiscriminate reprisals, and thus lessen the probability of the outbreak of Indian wars; and that by its effect upon the tribes it may induce them to restrain their young men and other lawless elements from the commission of depredations upon the whites, through fear of the tax upon their funds and annuities which would result from depredations. To this end, most of the treaties upon this subject provide that if the property be restored by the Indians in council, or the guilty individuals delivered up for punishment, no monetary indemnity may be required. If now, in a given class of cases, the circumstances are such that it is beyond the power of the tribe to affect the action of the individual, beyond their power to restore to the owner the property which is taken from him, and beyond their power to deliver up for punishment the wrongdoer, and if at the same time the body really responsible for the depredation is already at war with the United States, then the reason for the rule fails utterly; and when the reason for the rule ceases the rule ceases. In the case at bar it was no fault of the Mescaleros and through no negligence of theirs that the depredation was committed by those members of their tribe who had left them and joined Victoria's band. The United States had failed to protect itself and its citizens against the

incursions of Victoria's band. An armed force was in the field under his command; he was even allowed, with a small number of his followers, to visit the reservation and use the arts of persuasion for the purpose of recruiting his force under the very eyes of the authorities. The horses, sheep, and cattle taken from citizens were not carried to the camp of the Mescaleros. The Indians did not return, for, notwithstanding the assumption in the appellant's brief that the permanent allegiance of the Mescalero Indians was with their own tribe, and that their allegiance to Victoria's band was but temporary, there is nothing to show that they ever returned to their former allegiance. They were loyal to Victoria's cause and perished with him. It was beyond the power of the Mescaleros to restrain them from depredating, or to restore the property which they captured.

To hold the Mescalero tribe responsible would be to violate every principle of equity.

In the appellant's brief it is said that if the logically resulting converse of the decision of the Court of Claims in this case be considered it will result that if, out of a hostile tribe, a minor band remains at peace and commits depredations, the tribe must be answerable for these depredations. This, however, does not follow; in fact, could not logically be held. If a tribe be hostile and there be a band theretofore belonging to that tribe which possesses or acquires sufficient independence and autonomous character to be held to be a separate entity capable of sustaining political relations with the United States different from, and even opposed to, those of a majority of the tribe as already constituted, the decision which

held this would necessarily carry with it a judgment not against the original tribe but against the band in amity.

The appellant contends (Brief, p. 29) that—

> The temporary purpose and varying constituency of such a band, as in the present case, renders it impossible to make it a party defendant. Where is Victoria's band to-day? Its existence was unlawful from the beginning, and it thus never acquired property from which the claimant might recover or the United States seek to indemnify itself.

Pointing out, in passing, the fact that it was not the varying constituency of Victoria's band which enables appellant to ask, "Where is Victoria's band to-day?" but the fact that the band was annihilated in battle with United States troops, we may acknowledge that the question of the proper party against whom judgment should be rendered is not without difficulty. It is not a question, however, which is peculiar to this case. It may be asked with equal pertinency in regard to many tribes which have been made parties and against whom judgment has been rendered without question and with a tacit acceptance of the United States as a responsible judgment debtor. With equal pertinency appellant might ask, Where is the Chiricahua tribe to-day? The court has rendered judgment against the Aravapai tribe of Apaches, against the Chiricahua Apaches, the Gila Apaches, the Jicarilla Apaches, the Mimbres Apaches, and the Pinal Apaches; yet not one of these tribes has to-day any independent tribal existence whatever. Under the concentration policy which was adopted between 1870 and 1880 and the application of which to the Chiricahuas

was the direct result of the rebellion of Victoria's band, all these Apaches have been forced together upon the San Carlos Reservation. Separately they have no property. The appropriations made by the United States for their support are made "for support and civilization of the Apache and other Indians in Arizona and New Mexico who have been or may be collected on reservations in Arizona and New Mexico." (30 Stat. L., 77, 585, 937.) Under this same appropriation is included all the revenue of the Mescalero Apaches, against whom appellant would have the court render judgment in this case. Their tribal name has been kept alive merely from the fact that the reservation upon which they lived, in common with other Apache Indians, was originally named for that tribe. They too have no property, have no separate appropriation for their support and maintenance, and have no tribal existence which is recognized by the political department of the Government. Other tribes against whom judgment has been rendered have disappeared wholly from the face of the earth. This is but another indication of the similarity of the conditions affecting the different bands and tribes of the Apaches and other Indians and of the anomalous conditions introduced into the adjudication of these cases by the enforcement upon the tribe of liability for acts of individuals committed many years ago.

In any event, no argument against the independent status of Victoria's band can be drawn from the fact that the band was annihilated in battle. A friendly tribe may become extinct as well as a hostile band. To contend that judgment may not be rendered in any case

where the band or tribe to which the depredators belonged has ceased to exist does not help the claimant in this case and would take away the remedy in many cases where the court now renders judgments which are paid out of the Treasury of the United States.

PRESUMPTIONS IN FAVOR OF THE APPELLEES' CONTENTION.

This is a statute in derogation of the principles both of the common law and the law of nations. By virtue of the power which Congress has to legislate in regard to Indian tribes, it makes them responsible for acts committed by individuals without the sanction and without the knowledge of the tribe. Such a statute is always strictly construed, and where a doubt exists it should be resolved against the extension of the terms of the act.

Again, it is a statute in derogation of the sovereignty of the United States, and as such it should be strictly construed. In another case appealed from the Court of Claims under this statute, Brewer, J., delivering the opinion of the court, said:

> In case of an award by the Court of Claims the United States become in fact, if not in form, the primary and a solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate. (*Leighton* v. *The United States*, 161 U. S., 291.)

On still another ground the presumption is in favor of the appellees' contention. The court said in the case of *Marks et al.* v. *The United States et al.* (161 U. S., p. 297):

> Again, as often affirmed in the decisions of this court, the Indians are in a certain sense the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit.

In *The Choctaw Nation* v. *The United States* (119 U. S., 1, 28) this court said:

> How much more should this just and beneficent principle be applied in the interpretation of a statute which is in derogation of the ordinary principles of law and in derogation of the rights of the Indian tribes, considered as semiindependent nations under the general principles of international law.

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